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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

NO. 391

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

PETITION FOR REHEARING FOR WRIT OF CERTIORARI.

Robert Ballard Bailey, the petitioner, desires to refile his original petition for writ of certiorari.

I.

Jurisdiction, Constitutional Provisions Involved, Statement of the Case, and Statement of Proceedings have been related in the original petition on pages 2 and 3.

II.

ASSIGNMENT OF ERRORS

Assignment of Errors has been related in the original petition under Title III(a), on page 2.

III.

Statement of the case has been related under Statement of the Case III(c), page 4, of the original petition; however, we desire to state the following facts:

(1) Mrs. Fazio's statement as to the cause of her condition: Ruth Prenty (R. 49) said in answer to this question: "After you got Mrs. Shafer and she got there did she talk to Mrs. Fazio?" Answer: "She asked her what was wrong and she said a boy tried to kill her." Joe Fazio (R. 79) evidence shows that "Bob, the glass cutter" had caused her injuries; Frank Fazio (R. 97), that his mother told him that "Bob, the glass cutter" had caused her injuries; and Mrs. Frank Fazio (R. 99) evidence corroborates the evidence of Joe and Frank Fazio.

APPENDIX "A", — Affidavit of Emmett Thompson, a policeman of Charleston, West Virginia, for eighteen years, states that immediately after Mrs. Fazio was found he asked Dominic Fazio, husband of Mrs. Fazio, to ask Mrs. Fazio in Italian who had injured her. Mr. Fazio complied with the request and Mrs. Fazio made answer in Italian to Mr. Fazio and Mr. Fazio told the policeman she had said that "Bob, the fellow that fixes the glass, the big fellow" was the man who had injured her.

(2) The evidence of Ralph W. Ballard (R. 101) is that he saw Mrs. Fazio at approximately five o'clock the same afternoon in what he thought to be a black Buick sedan automobile.

APPENDIX "B", — This exhibit from the State Road Commission of the State of West Virginia shows that in 1946, at the time he made application for a license that Robert Ballard Bailey weighed 155 pounds.

APPENDIX "C", — Affidavit of Pearl Bailey, mother of Robert Ballard Bailey, asserts that for the past several

years, prior to his confinement in 1949 in jail and the penitentiary, Robert Ballard Bailey's weight was around 150 pounds and that his weight stayed practically the same.

State Exhibit No. 7 (R. 160C) The photograph of Robert Ballard Bailey.

V.

REASONS FOR ALLOWANCE OF WRIT

The reasons for allowance of writ have already been related in the original petition under TITLE IV, page 9; however, we desire to add her Point 9.

9. The affidavits, Appendix "B" and Appendix "C" and Appendix "D" of the original petition and brief, and Appendix "A", Appendix "B", and Appendix "C" of this petition are newly discovered evidence which corroborates the evidence of Robert Ballard Bailey as to his innocence, and such evidence has not been considered heretofore by any court, except this court as to a part of the affidavits filed in the original brief.

In view of this newly discovered evidence Robert Ballard Bailey is entitled to a new trial and the opportunity of presenting all the facts. Under our Constitution he is entitled to a fair and impartial trial.

PRAYER

Petitioner, therefore, prays that this petition be granted and for such other and further relief in the premises that may be proper and just.

This the 18th day of December, 1950.

ROBERT BALLARD BAILEY,
By W. HAYES PETTRY,
Attorney for and of
Counsel with Petitioner.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, W. Hayes Pettry, do hereby certify that the foregoing petition for rehearing for writ of certiorari is not made for the purpose of delay and is made in good faith.

W. HAYES PETTRY.

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

NO. 391

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR REHEARING FOR WRIT OF CERTIORARI.

Robert Ballard Bailey, the petitioner, desires to refile his original brief, together with this brief in support thereof.

I.

OPINION OF THE COURT

The opinion of the court below will be found on page 13 of the original brief filed herein.

II.

JURISDICTION

The jurisdiction of this Court will be found on page 13 of the original brief filed herein.

III.

The facts in the case have already been related in the original petition under Title III(c), page 4, and in the foregoing petition under Title III (c).

2 Assignment of Errors have already been related in the original petition under Title III (a).

IV.

GROUNDS FOR JURISDICTION

The grounds on which the jurisdiction of this Court is invoked have already been related in the original petition and in the preceding petition under Title IV—Reasons for Allowance of Writ.

ARGUMENT

The statements of Mrs. Rosina Fazio as to the cause of her injuries are irreconcilable.

(1) Ruth Prenty (R. 49) states that Mrs. Fazio told Mrs. Shafer that "a boy tried to kill" her.

(2) The affidavit of Emmett Thompson, the policeman, who saw Mrs. Fazio soon after she was found on the night of October 22, 1949, at the hospital in the emergency room at the St. Francis Hospital, that Dominic Fazio, the husband of Rosina Fazio, asked her in Italian who had injured her and she said "Bob, the fellow that fixes glass, the big fellow."

(3) Then the evidence of Joe Fazio (R. 79), her son, Frank Fazio (R. 97), another son, and Mrs. Frank Fazio (R. 99) that it was "Bob, the glass cutter" who had injured her, and also identified the picture of Robert Ballard Bailey.

Let us analyze the three statements made by Mrs. Fazio with reference to her injury and the cause of her death:

First, Ruth Prenty's evidence (R. 49) that Mrs. Fazio stated a boy tried to kill her. Robert Ballard Bailey was born December 11, 1913 (R. 124)). At the time of the incident in this case Robert Ballard Bailey was thirty-five years old. Then it must follow that he could not be considered a boy, because of his age.

Second, The statement of the Policeman, Emmett Thompson, that it was "Bob, the man who fixes glass. The big fellow." This statement shows clearly that it was not Robert Ballard Bailey for the reason that his picture and affidavits shows Robert Ballard Bailey to be a man of 150 to 155 pounds. Certainly, a man of this weight could not be considered as a "big fellow." Also in view of his height which is five foot 9 inches.

It is strange that the policeman, Emmett Thompson, who saw Mrs. Fazio the night of her injury was not brought forth at the trial.

Third, The statements made by Mrs. Fazio to her two sons and daughter-in-law are the only statements that would implicate Robert Ballard Bailey. It is to be noted that the only statements made which would indicate that Robert Ballard Bailey had injured Mrs. Fazio were made to her two sons and her daughter-in-law, while the other two statements were made to and in the presence of other people.

Now then, let us examine which one of these three statements, under the evidence, is the most accurate. We contend that Statement No. 2, which Mrs. Fazio made to the policeman, Emmett Thompson, at the St. Francis Hospital, that it was "Bob, the big fellow" is the most accurate, for the reason that the affidavits of Goldie Moore and George Rowlands, Appendix B and Appendix C of the original petition assert that they saw Mrs. Fazio about five o'clock on the afternoon she was injured and

that she was with a man who was not Robert Ballard Bailey, and who was a big man. We urge that the statement made to the policeman, Emmett Thompson, is the most logical in view of the affidavits of Moore and Rowlands that can be attached to any of her statements.

Due to the inconsistencies of the three different statements made by Mrs. Fazio on the three different occasions as to who caused her injuries, none of them should be admitted in evidence as a dying declaration.

The Constitution of the United States guarantees to Robert Ballard Bailey a fair and impartial trial. We believe that the newly discovered evidence which is contained in the various affidavits submitted herewith is material and relevant evidence which was not presented to the jury at the trial, and unless Robert Ballard Bailey is given the opportunity to present all the evidence relevant and material to his case, then we believe that he has not been given a fair and impartial trial as guaranteed by the Constitution of the United States.

Under our system of jurisprudence the accused should be given the benefit of all reasonable doubt, and this newly discovered evidence, which evidence was not available to Robert Ballard Bailey at the time of his trial, would create a doubt as to his guilt. It is to be noted that much of this evidence was known to the State at the time of the trial, and in our humble belief, if it had been presented to the jury, the jury would have reached a different conclusion.

We urge that this case be reopened, and that the petitioner be given an opportunity to present all pertinent and newly discovered evidence for consideration by the court and jury as to his innocence or guilt upon a new trial, so that his Constitutional rights guaranteeing a fair and impartial trial will not be infringed upon or denied.

CONCLUSION

Your petitioner respectfully submits that the questions presented by the original petition and the foregoing petition show facts calling for the exercise by this Court of its supervisory powers, — that the petitioner's rights under the Constitution of the United States be preserved, and that upon this rehearing a writ of certiorari should be granted, and the questions herein should be reviewed by this Court.

Respectfully submitted,

W. HAYES PETTRY,
Attorney for and of
Counsel with Petitioner.